BRIEF IN SUPPORT OF PETITION.

PRELIMINARY MATTERS.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia may be found in the record at pages 77 to 80. It is reported in ..... F. (2d) at page .....

Statement of the Case.

The principal facts have been summarized in the petition *supra,* pages 2 to 5 and are succinctly stated in the opinion of the Court below (R. 79).

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code as amended by the Act of February 13, 1925, Title 28 U. S. C. A. Section 347a.

Statutes Involved.

Sections 3929 and 4041, Revised Statutes as amended (Title 39 U. S. C. A. Sections 259 and 732)[2]; the Federal Declaratory Judgment Act of June 14, 1934, 48 Stat. 955, Chapter 512; Judicial Code Section 274 D (Title 28 U. S. C. A. Section 400); and the due process clause of the Fifth Amendment of the Constitution of the United States.

2. Sec. 3929 is set forth in full in the appendix.

Specifications of Error.

The United States Court of Appeals for the District of Columbia erred as follows:

1. In affirming the decree of the District Court of the United States for the District of Columbia, dismissing petitioners' complaint.

2. In holding that a reasonable doubt on the merits must be shown by the plaintiff to justify the granting of equitable relief by a Court where due process of law is not accorded in an administrative proceeding of a quasi-judicial nature.

3. In denying petitioners' (appellants below) petition for a rehearing before the full bench of the Court, grounded upon the contention that since the original action was brought under the Federal Declaratory Judgment Act of 1934, the Court should have reversed the decision of the lower court dismissing the complaint and remanded the cause to the Trial Court with instruction to enter its judgment declaring that the action of the Postmaster General was violative of petitioners' constitutional right to due process of law.

4. In denying petitioners' petition for rehearing grounded upon the contention of petitioners that there is no authority or support in law for the Court's contention in effect (and upon which it apparently based its decision) that an alleged wrong-doer is foreclosed from relief in the Federal Courts against an invasion of his constitutional right to due process of law by an administrative agency of government.

ARGUMENT.

I.

The Power of the Postmaster General Under the So-called Fraud Order Statutes (39 U. S. C. A. Sections 259 and 732) Is Quasi-Judicial and Not Discretionary or Ministerial in Nature and Is Limited by the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

The United States Court of Appeals for the District of Columbia expressed the opinion, without applying same to the instant case, that the Postmaster General's authority under such statutes is governed by the Acts of Congress which confer it, and *by the law of the land* (R. 80). The Court in this connection cited the decision of this Honorable Court in *Burton* v. *United States,* 202 U. S. 344, 371; the dissent of Mr. Justice Brandeis in *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 430; and the dissent of Mr. Justice Holmes in *Leach* v. *Carlile,* 258 U. S. 138, 141, stating that "it would be going a long way therefor to say that in the management of the post office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution".

Apparently, in quoting the language of Justice Brandeis in the Burleson case that: "The function is a strictly judicial one", the United States Court of Appeals for the District of Columbia recognized that to be the applicable law of the case.

That other Federal Courts have recognized that the proceeding is quasi-judicial and not ministerial in nature is exemplified by numerous decisions. In *Peoples United*

States Bank v. *Gilson*, 161 Fed. 285, 290, Judge Sanborn of the Eighth Circuit Court of Appeals said:

> "But this authority, like that of every other executive office *upon whom quasi-judicial duty is conferred* by Act of Congress is neither unbounded, arbitrary, *nor discretionary*, and its exercise is governed by the Acts of Congress which confer it, and *by the law of the land*, and his violation or disregard of either is remedial in the Courts." (Emphasis supplied.)

Other cases in which it was directly or inferentially declared that a fair hearing is necessary and that the fraud order proceeding is quasi-judicial in nature, are as follows:

> Equity will not relieve against fraud order issued *after fair hearing* without mistake of law, on substantial evidence. *Aycock* v. *O'Brien*, 28 F. (2d) 817 (C. C. A. 9th, 1938).
>
> The order or ruling is at least *quasi-judicial in its nature*, required to be made upon evidence "satisfactory" to the Postmaster General, and has the effect of a judgment or decree denying to the citizen a *very substantial right* from which there is no appeal except to the Courts. *Bailey Gaunce Oil & Ref. Co.* v. *Duncan*, 10 F. Supp. 280 (D. C. La. 1934).
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> A citizen of the United States has a property right in the use of the mails for lawful purposes of which he cannot be deprived without due process of law. * * * It is the exercise not of an executive power by a *judicial* one for an executive officer to exclude a citizen from use of the mails. *Hoover* v. *McChesney*, 81 Fed. 472 (C. C. Ky. 1897).

The right to notice and hearing is imperative in judicial or quasi-judicial proceeding although hearing is not especially enjoined by satute, such right being constitutional. *Clarksburg-Columbus Short Route Bridge Co.* v. *Woodring*, 89 F. (2d) 88; 67 App. D. C. 44. Reversed on other grounds, 302 U. S. 658.

Where the Postmaster General issues a fraud order without jurisdiction or by reason of an error of law and thereby stops the delivery of letters containing important enclo-

sures and refuses the payment of money orders, he violates the property rights of the person or company whose letters are thus withheld and who are payees of postal money orders. *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94; *Peoples United States Bank* v. *Gilson,* 161 Fed. 286. Cf. *Lukens Steel Co.* v. *Perkins,* 107 F. (2d) 627, 70 App. D. C. 354; reversed on other grounds, 310 U. S. 113; *McLean Lumber Co.* v. *United States,* 237 Fed. 460, 465, and dissent of Mr. Justice Brandeis in *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 432.

An administrative proceeding resulting in an order confiscating property of the person affected is a proceeding of a quasi-judicial character. *Morgan* v. *United States,* 298 U. S. 468, 480; *Lukens Steel Co.* v. *Perkins* (*supra*). The power of Congress over the mails is not unlimited and is subject to the Bill of Rights. *Burton* v. *United States,* 202 U. S. 344, 371; *Securities and Exchange Commission* v. *Timetrust, Inc.,* 28 F. Supp. 24.

The phrase "due process of law" is synonymous with the phrase "according to the law of the land" and the due process of law clause governs any action whether through the legislative body, the Courts or through executive or administrative officers. *Fleenor* v. *Hammond,* 116 F. (2d) 982.

Inquisitorial powers vested by Congress in government bureaus and officials charged with duty of regulating business activities of citizens are subject to beneficent provisions of so-called Federal Bill of Rights in first ten Amendments to Federal Constitution, which cannot be impaired by Congress. *United States* v. *Goodner,* 35 F. Supp. 286.

Therefore, it can only follow that the principle laid down by this Court in *Morgan* v. *United States,* 298 U. S. 468, 480, that the one who decides must hear and the principle of the second Morgan case (*Morgan* v. *United States,* 304 U. S. 1, 18), that the requirements of fairness (in an ad-

ministrative proceeding of a quasi-judicial nature) are not exhausted in the taking or consideration of evidence but extend to the concluding part of the procedure as well as to the beginning and intermediate steps, applies with equal force to the proceeding in which a citizen is required to appear before the Solicitor of the Post Office Department and show cause why a fraud order should not be issued against him by the Postmaster General under the fraud order statutes.

Various Circuit Courts of Appeals in applying the doctrine of the Morgan cases, have held that the one who decides must hear or in the case of written testimony, *read* (*National Labor Relations Board* v. *Botany Worsted Mills*, 106 F. (2d) 263, 265—C. C. A. 3d), and that there is no legal basis for an order of an administrative board where those persons whose character and experience and attainments have been considered such as to warrant their appointment by the President and confirmation by the Senate, and to whom Congress has committed the ascertainment of the facts, do not ascertain them. (*National Labor Relations Board* v. *Cherry Cotton Mills*, 98 F. (2d) 444, 446—C. C. A. 5th).

This Court has also said in *Anniston Manufacturing Company* v. *Davis*, 301 U. S. 337, at page 357, that:

> "The whole scheme of the administrative proceeding presupposes hearings and determination in accordance with the demands of due process. *The Board* which makes its findings and renders its decision *must consider the evidence* and base its findings and decision upon it and until the contrary appears, we must assume that the Board will do so. *Morgan* v. *United States*, 298 U. S. 468." (Emphasis supplied)

Likewise in *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, Mr. Justice Frankfurter of this Court said:

> "* * * the laws under which these agencies operate prescribe the fundamentals of fair play. They require

> that interested parties be afforded an opportunity for hearing and *that judgment must express a reasoned conclusion.*" (Emphasis supplied.)

In the instant case, as the Appellate Court stated in its opinion, the Postmaster General admitted that petitioners were not afforded an opportunity to see and have access to the findings of fact prepared by the active prosecutor and that he had not read or considered the testimony or heard argument or read petitioners' brief. Where then, is the "reasoned conclusion" leading to the judgment and how does such action comply with the language of the statute and the order itself—"upon *evidence* satisfactory to the Postmaster General"?

Although there is no dogmatic doctrine that directly requires that a copy of the findings of fact as such must be served upon respondents as a requisite for a fair hearing, yet it is apparent that the Hearing Officer's findings of fact should be furnished when the officer who issues the *final* order in such a proceeding neither hears the evidence or argument nor considers and appraises the evidence by reading the written testimony. The recognized method which has been approved by this Court and by various Circuit Courts of Appeals, of presenting the contentions of a respondent as to the evidence, or lack of evidence, to support a conclusion or contention of the administrative officer's subordinate who did hear the evidence, is by means of furnishing the respondent with a finding of fact. The purpose and propriety of a finding of fact or tentative examiner's report, is to not only acquaint the respondent with the conclusions and issues framed from the evidence, but to likewise give the respondent an opportunity to except to such findings and to point out any errors, inaccuracies and improprieties therein to the board, commission or officer vested with the power by statute to issue an order controlling the activities of others—thereby raising issues of fact and law on the evidence, so that the final authority

may have before it a summary of the points involved in the case, and can thereby render justice by carefully considering the points raised and appraise the evidence in connection with such points.

The cases in which the Courts have held that no formal findings of fact, as such, were necessary, all show that some other similar method was employed in getting the contentions and exceptions of a respondent before the administrative board or officials. *National Labor Relations Board* v. *Mackey Radio,* 304 U. S. 333; *In re National Labor Relations Board,* 304 U. S. 486; *National Labor Relations Board* v. *Cherry Cotton Mills,* 98 F. (2d) 444; *National Labor Relations Board* v. *Biles Coleman Lumber Co.,* 98 F. (2d) 18; *Cupples Mfg. Co.* v. *National Labor Relations Board,* 103 F. (2d) 953.

The reason for requiring procedural due process of law in this type of proceeding is best expressed by the language of this Court in *Powell* v. *Alabama,* 287 U. S. 45, 68, as follows:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirements of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions."

While the language of the opinion of the United States Court of Appeals for the District of Columbia indicates that the points of law raised on the appeal were decided upon the sole ground that a reasonable doubt upon the merits of the controversy before the Post Office Department should have been shown, yet the most reasonable and logical interpretation that can be placed upon the Court's

discussion of the constitutional question (which it declined to decide) is that due process of law is as applicable to the fraud order proceedings of the Post Office Department as it is to every other administrative proceeding of a quasi-judicial nature. Further, the Court in its discussion of this point indicated that the procedure followed in the instant case was not due process of law.

Therefore, if it can be conceded that the Court below was correct in its enunciation of the principles surrounding the constitutional issue, then there remains only one point to be considered, and that is that the Court erred in deciding, in effect, that the constitutional question cannot be considered unless accompanied by some showing of a reasonable doubt on the merits that petitioners were not wrongdoers. If such premise is a correct one, then the contention of the United States Court of Appeals for the District of Columbia on this point is in conflict with the decisions of other Circuit Courts of Appeal in other jurisdictions, and is contrary to the settled doctrine that an accused is entitled to a full and fair trial regardless of his guilt or innocence.

II.

Where Constitutional Rights to a Hearing Satisfying Due Process of Law Are Invaded, the Courts Are Bound to Consider the Constitution and Statutes as They Affect a Quasi-Judicial Order, and Touch the Manner of Its Making as Distinguished from Correctness of Its Conclusions.

It is the Court's power and duty to pursue an inquiry into the method of decision and to review all questions of jurisdiction and regularity of proceedings and all questions of constitutional right and statutory authority. *National Labor Relations Board* v. *Cupples Mfg. Co.*, 103 F. (2d) 953.

Jurisdictional facts are subject to judicial review although found by the board or agency. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47; *National Labor Relations Board* v. *Cherry Cotton Mills*, 98 F. (2d) 444; *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18.

If it can be said that quasi-judicial tribunals fall in the same category as judicial tribunals so far as the conduct of trials before them is concerned, the recent case of *Hansberry* v. *Lee*, 311 U. S. ..... ; 85 L. Ed. 11, 13 (advance opinions), throws some light on the subject. By substituting the words "quasi-judicial agency," for "Court" in the opinion, this Court's pertinent dicta might be paraphrased to read:

> "But when a judgment of a [quasi-judicial agency] is challenged for want of due process it becomes the duty of this Court to examine the course of procedure —to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as the requisites of the due process which the Constitution prescribe. *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 273."

Findings and orders of an administrative agency may be rejected by the Courts, because of errors in the procedure amounting to a denial to a fair hearing. *Arkansas Wholesale Grocers Assn.* v. *Federal Trade Commission*, 18 F. (2d) 866, (C. C. A. 8th) certiorari denied 275 U. S. 533.

In *Powhatan Mining Co.* v. *Ickes*, 118 F. (2d) 105, 110, the Circuit Court of Appeals for the 6th Circuit stated:

> "The fact that the directors' order might be justified on the merits does not obviate the requirement of a fair trial. *Inland Steel Co.* v. *National Labor Relations Board*, 7th Circuit, 109 F. (2d) 9, 20. The requirement of a fair trial is binding on administrative agencies as well as on Courts. *Morgan* v. *United States*, 304 U. S. 1, 14, 15; *Shields* v. *Utah, Idaho Central R. Co.*, 305 U. S. 177; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304.

In *National Labor Relations Board* v. *Prettyman,* 117 F. (2d) 786, 791, the Circuit Court of Appeals for the 6th Circuit, also on the authority of *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304, stated:

> "Even if the order of the Board were justified by the facts,—the necessity of according due process of law to the respondents is not obviated. No order is just if obtained without due process of law; otherwise the Board could enter orders without a hearing."

III.

The Federal Courts Are Required to Exercise Their General Equity Powers (Where There Is No Adequate Remedy at Law) to Prevent, and Their Statutory Powers to Declare, Against Irreparable Damage and Injury Resulting from Invasion of the Citizen's Constitutional Rights and Guarantee to Due Process of Law.

Under the Federal Rules of Civil Procedure, a complaint is sufficient if it sets forth facts which show the plaintiff is entitled to any relief which the Court can grant. Federal Rules of Civil Procedure, Rule 54 (c), 28 U. S. C. A. following Section 723C. *Keiser* v. *Walsh,* 118 F. (2d) 13, 14.

In the instant case the complaint (R. 2) stated that the action arose under the Federal Declaratory Judgment Act of 1934. The relief sought included a judgment (R. 5) declaring the rights of the plaintiffs to due process of law in the fraud order proceedings and secondarily for injunctive relief (R. 6).

The appellate court took the position in its opinion that "some prejudice must be shown to have resulted to appellants to justify us in issuing the writ of injunction" (R. 80) and that the appeal was without merit on the assumption that appellants were wrongdoers because they did not include the transcript of testimony before the Post Office Department in the record on appeal (R. 80).

Petitioners sought to point out the fallacy of such a contention in their petition for rehearing, which is set forth in full in the printed record beginning at page 81, because the appellate court had apparently grounded its decision on an obscure technical point that was never considered by the parties or the Trial Court—overlooking completely the real issues of the case. In the light of the nature of the action (for declaratory judgment) substantial justice could have been done by an unequivocable decision under the Declaratory Judgment Act,—where no question of "exercise of discretion" or "issuing the writ of injunction" would have arisen. If the Post Office Department procedure did not accord petitioners due process of law, a declaratory judgment to that effect would have been sufficient as determinative of the rights of the parties. If the Postmaster General then ignored such a declaration in favor of the plaintiffs, the same could then be enforced by injunctive relief under the Court's right to enforce its judgment.

Where a plaintiff, though in a position to sue for executory or coercive decree, contents himself with milder declaration of rights as adequate to his purposes, declaratory judgment is available because plaintiff is content with mere declaration for which Declaratory Judgment Act provides, even though he may have a coercive judgment or decree by asking for it. *Stephenson* v. *Equitable Life Assurance Society*, 92 F. (2d) 406 (C. C. A. 4th).

On the other hand, even if the form of the action were ignored completely, the facts set forth in the petitioners' complaint and established by the uncontradicted proof, standing alone, should have been sufficient to warrant the exercise of the Federal Court's equity powers. Both irreparable injury and inadequacy of remedy at law were alleged and conceded (R. 48). Why then, if petitioners' constitutional rights to due process of law were invaded and their property taken from them as a result of the fraud

order action, are they not entitled to the greatest relief a Federal Court could give them? If equitable relief were not available in such cases, the citizen deprived of his liberty or property without a hearing could afterwards not be heard to complain because the government prosecutor, acting under the guise of some statute enacted by Congress, has charged and *ex parte* found him guilty of some offense under the statute. If such conditions were permitted to exist, every citizen charged with some act of wrongdoing by an agency of the government in cases where no statutory right of appeal existed, would find the doors of equity closed to him for relief from irreparable injury and damage, merely because he has been charged with wrongdoing, whether justly or unjustly. (See discussion and cases cited in petition for rehearing (R. 87).)

It has been held by this Court that the proper method to secure a review of the Postmaster General's fraud order is by suit in equity for injunctive relief. *Degges* v. *Hitchcock*, 229 U. S. 162.

If it should appear that in a particular statute no adequate provision has been made for judicial review, writ of injunction is perhaps the only proper available remedy. *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 101 F. (2d) 426, aff'd. 306 U. S. 56.

Equitable jurisdiction of a suit which presents one ground for equitable relief, with no adequate remedy at law, extends to the disposition of all the questions raised by the bill since a court of equity does not do justice by halves, and will prevent, if possible, a multiplicity of suits. *Shaffer* v. *Carter*, 252 U. S. 37.

Exemption of government from suit does not protect officers of government from personal liability to persons whose rights of property they have invaded and does not preclude equity from restraining such invasion. *Jamestown Veneer & Plywood Corp.* v. *National Labor Relations Board*, 13 F. Supp. 405.

Conclusion.

The issues involved in this case present an important question as to whether procedural standards of due process of law apply to a fraud order proceeding of the Post Office Department. The question has never been so definitely and unequivocably presented as it is in the instant case and until this Honorable Court establishes the law on the point, the large and important mail order industry can be subjected to unreasonable and unwarranted interference by Post Office Department officials without limitation. All business firms and individuals using the mails in the course and conduct of their business and personal relationships could be deprived of the important mail privilege without restriction and without hearings in complete disregard of their constitutional rights and guarantees.

It is therefore respectfully submitted that the cause is manifestly one calling for the exercise by this Honorable Court of its supervisory power and that to such end, a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia.

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